

# HARKINS CUNNINGHAM LLP

*Attorneys at Law*

Paul A. Cunningham  
202.973.7601  
pac@harkinscunningham.com

1700 K Street, N.W.  
Suite 400  
Washington, D.C. 20006-3804  
Telephone 202.973.7600  
Facsimile 202.973.7610

February 23, 2009

## **BY HAND DELIVERY**

Anne K. Quinlan, Esq.  
Acting Secretary  
Surface Transportation Board  
Office of the Secretary  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation –  
Control – EJ&E West Company* (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

Applicants Canadian National Railway Company and Grand Trunk Corporation (collectively, "CN") have made clear during the course of this proceeding that they would voluntarily accept environmental conditions that are in keeping with the Board's traditional approach to such conditions and with the level of mitigation that the Board has imposed in prior control transactions. In order to implement that commitment, CN submitted its Voluntary Mitigation Proposal, agreeing to 108 environmental mitigation conditions that it now estimates will cost in excess of \$60 million. That amount, together with the costs paid by CN for SEA's third-party consultant (more than \$21 million), represents over 25% of the \$300 million transaction price, an unprecedented proportion for environmental mitigation.

In Decision No. 16 (served Dec. 24, 2008), the Board approved CN's Application, subject to the environmental conditions listed in Appendix A to that Decision. Appendix A included the voluntary conditions of CN's Voluntary Mitigation Proposal. The Board also imposed 74 additional Final Mitigation Conditions ("FMC") (including one, FMC #1, that required compliance with CN's voluntary mitigation measures). CN will accept without challenge 73 of the additional 74 FMCs imposed by the Board, notwithstanding that many of these additional FMCs impose significant further costs and burdens on CN. The one FMC that CN cannot accept without challenge is FMC #14. This unprecedented condition would require that CN not only coordinate with state and local officials for the implementation of two grade separations, but also fund 67% of one and 78.5% of the other. Based on the cost estimates in the Final Environmental Impact Statement (\$52.5 million at Lincoln Highway and \$40.4 million at Ogden Avenue), CN's contribution for the two separations could approach \$70 million, an

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amount that in combination with the cost of the other FMCs could cause CN's total mitigation costs to reach \$160 million, or more than 50% of the transaction price. The potential costs imposed on CN by the Board's grade separation requirements are therefore large both in absolute terms and relative to the purchase price of the transaction.

CN believes that the Board's unprecedented imposition of these major potential costs on CN was unwarranted and unlawful. Railroads typically pay five to ten percent of the costs of a grade separation, with the bulk of the costs paid from federal and state funds. Importantly, the communities that seek grade separations are generally not responsible for funding this infrastructure – the funding comes primarily from the federal government, with some portion provided by the state government, and up to ten percent from the relevant railroad. The STB has never required as a condition of a past merger the level of railroad contribution to grade separations it required here, and there was no basis for the Board's extraordinary departure from this past practice.

Both the Board's predecessor and the Federal Highway Administration ("FHWA") have found that railroads derive only a small share of the benefits from the elimination of rail-highway grade crossings and accordingly should pay no more than five to ten percent of the related costs. That view is reflected in long-standing federal law, which provides that where federal funds are used to pay for the elimination of rail-highway grade crossings railroads shall contribute an amount equal to their direct benefit from the project, which amount "shall in no case exceed ten per centum." 23 U.S.C. § 130(b). It is also reflected in the regulations of the FHWA, which cap a railroad's share of the cost of eliminating rail-highway grade crossings at five percent. 23 C.F.R. § 646.210. Even if one were to accept the Board's decision that these two grade separations are appropriate as mitigation conditions for this transaction, that decision provides neither an occasion nor a basis for the Board's departure from these longstanding federal policies concerning the appropriate funding for grade separations.

CN believes the Board has no authority to impose this environmental condition over the objection of applicants in a proceeding governed by the standards of 49 U.S.C. § 11324(d) and that, even if the Board has such authority, it acted arbitrarily and capriciously here by imposing that condition. For these reasons, after careful consideration, CN is today filing a petition for review with the Court of Appeals challenging the Board's authority and decision to impose FMC #14.

CN's challenge to the Board's authority to impose environmental conditions over the applicants' objection in a proceeding governed by section 11324(d), would, if successful, apply in principle to all FMCs for which CN has not volunteered. However, CN is limiting its challenge on appeal to FMC #14. In order to eliminate any uncertainty as to CN's position, and assure that CN's challenge to the Board's conditioning authority would not affect the application

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of other FMCs, CN by this letter is informing the Board and other parties that it hereby adopts and consents to imposition of the 73 FMCs other than FMC #14.<sup>1</sup>

By voluntarily agreeing to these additional environmental conditions, CN is reaffirming its commitment to protect local communities from the adverse impacts of the EJ&E transaction through reasonable environmental mitigation measures. In total, CN has now consented to 181 environmental mitigation conditions covering all sources and types of potential significant impacts from increased rail traffic, including: rail operations; rail, vehicle, pedestrian, and bicycle safety; hazardous materials transportation; quiet zones; regional and local highway systems (including grade crossing delay); emergency response delay; airports; land use; environmental justice; air quality and climate; noise and vibration; biological resources (including federal and state listed endangered species); water resources; construction; and monitoring and oversight.<sup>2</sup> This level and scope of mitigation fully and adequately addresses the environmental impacts that can be reasonably expected to result from its recent acquisition of EJ&E's principal lines.

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company  
and Grand Trunk Corporation

cc: Chairman Charles D. Nottingham  
Vice Chairman Francis P. Mulvey  
Commissioner W. Douglas Buttrey  
Ellen D. Hanson, Esq., General Counsel  
Victoria J. Ruston, Chief, Section of Environmental Analysis  
All parties of record

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<sup>1</sup> While CN hereby voluntarily submits to the Board's ongoing monitoring and oversight, as specified in the FMCs, CN reserves all rights with respect to any issues that may arise concerning the FMCs or any additional CN obligations the Board may consider relating to the Transaction.

<sup>2</sup> Building on CN's success in reaching mitigation agreements with 10 impacted communities prior to the Board's decision, CN is also continuing discussions with other communities in the hope of reaching additional agreements on reasonable terms that can meet their individual needs.